No. 10088.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED ROYALTIES, INC., a corporation, and C. B. CALLAHAN,

Appellants,

vs.

HARRY ASHTON, Trustee of the Estate of DEEP HOLE DRILLING CORPORATION, Bankrupt, *et al.*,

Appellees.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANTS.

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SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANTS.

Pursuant to permission of court obtained at the time of the oral argument, appellants file this supplemental brief in support of the jurisdiction of the Circuit Court of Appeals to hear and determine this matter and in support of their contention that under the circumstances of this case an appeal may be taken by appellants as a matter of right.

Appellant, Consolidated Royalties, Inc., received a conveyance of a 5% overriding royalty interest and appellant, C. B. Callahan, received a conveyance of a 7% overriding

royalty interest in the oil to be produced from the land upon which was situated Well No. 1 of the Deep Hole Drilling Corporation. This was accomplished pursuant to a permit of the Corporation Commissioner of the State of California. Paragraph 4 of the application for this permit states that the applicant proposed to sell and issue to appellants, or either of them, a 12% royalty interest in said Well No. 1 at and for the selling price of $950.00 for each 1%. [Tr. p. 34.] The permit authorized such sale and the Deep Hole Drilling Corporation received $4750.00 from Consolidated Royalties, Inc. and $6650.00 from C. B. Callahan in consideration for such conveyances. [Tr. p. 29.] Consolidated Royalties, Inc. was given the right to collect payment of 12% of the proceeds of the oil from Standard Oil Company under the division order which was signed by both Deep Hole Drilling Corporation and C. B. Callahan and accepted by Standard Oil Company. [Tr. pp. 53-54.] Although two separate conveyances were made, it was accomplished in a single transaction in which both appellants were jointly interested. The prayer of the petition for the order to show cause in this matter [Tr. p. 6] required appellants to show cause why the Standard Oil Company of California should not turn over to the appellee the proceeds of all production for which previous payment had not been made and adjudging and decreeing that appellants had no right, title or interest in or to the production from the well or the proceeds of such production and classifying the rights of appellants in respect to the rights of general creditors.

The order to show cause itself [Tr. p. 8], which was addressed to appellants, required them to show cause why the relief prayed for by the trustee should not be granted and restrained appellants from prosecuting any action with respect to such proceeds or production. The order made in said matter by the referee [Tr. pp. 63-64] refers to the interest of the appellants as a 12% interest in the oil produced, but does not state this to be a several interest. The moneys on hand at that time amounted to $846.08, but the order further provided that the right, title and interest of appellants in and to such 12% of the oil and the net proceeds thereof at that time amounting to said sum, plus such further proceeds as might accrue after April 30, 1940, were subject and subordinate to unpaid claims of creditors amounting to $4,000.00 and the order required the Standard Oil Company to pay over all proceeds from the 12% until further order of a court of competent jurisdiction. In other words, appellants may not receive any part of their 12% of the proceeds from the well or production of said well until creditors have been paid $4,000.00. The findings of the Referee [Tr. p. 62] state that the trustee did not have assets sufficient to pay the claims of creditors for the drilling of Well No. 1. The order was not limited to $846.08, but required such further proceeds as accrue from said well after April 30, 1940, to be paid to the trustee until $4,000.00 in claims have been paid. The total amount now held by the Standard Oil Company on account of the 12% royalty interest is $1018.04. This in itself establishes that more

than $500.00 jurisdictional amount is involved. Also appellants wish to point out that the stipulated facts and the findings establish that they paid $950.00 for each per cent of interest owned. [Tr. pp. 21, 61.] The value placed upon a 1% interest in the well by the Deep Hole Drilling Corporation in its application to the Corporation Commission was $1500.00 [Tr. p. 45.] It is clear therefore that the value of appellants' respective interests in the oil which has been subordinated to the general creditors greatly exceeds $500.00 each.

Appellants submit that the court has jurisdiction, for the following reasons:

I. This is a controversy arising in bankruptcy, being a separable issue between appellants and the trustee concerning the right of the bankruptcy court to assume jurisdiction over appellants' property and concerns the right, title and interest of the bankrupt in and to appellants' oil. Therefore, it is an appeal which appellants are entitled to as a matter of right. Money is not the sole right affected by the order but appellants' property right in and to oil as well.

II. A trust fund was established for appellants and the aggregate amount to which they are entitled from this trust fund exceeds $500.00.

ARGUMENT.

POINT I.

This Is a Controversy Arising in Bankruptcy Being a Separable Issue Between Appellants and the Trustee Concerning the Right of the Bankruptcy Court to Assume Jurisdiction Over Appellants' Property and Concerns the Right, Title and Interest of the Bankrupt in and to Appellants' Oil. Therefore, It Is an Appeal Which Appellants Are Entitled to as a Matter of Right.

The sum of $846.00 is not all that is involved. Proceeds from 12% of the production of the well after April 30, 1940, were also included which, as above stated, have increased the sum held by the Standard Oil Company to $1018.04. This is a controversy arising in bankruptcy proceedings. Appellants claim ownership of 12% of the oil produced from the land upon which Well No. 1 is located. The trustee in bankruptcy is seeking to take appellants' oil for the benefit of the general creditors of the bankrupt corporation, which conveyed this oil to the appellants long prior to bankruptcy and for value in the amount of $11,400.00.

It is stated in the case of *In re Bastanchury Corp.*, 62 F. (2d) 537 at page 541 (9th Cir.):

> "'1. It is clear that the proceeding instituted by the trustee for the recovery of property in the possession of the respondent, to which she asserted an adverse claim, presented "a controversy arising in a bankruptcy proceeding"—as distinguished from an

> administrative "proceeding" in bankruptcy—which might be reviewed by the Circuit Court of Appeals, both as to fact and law, by an appeal taken under Section 24a of the Bankruptcy Act (11 U. S. C. A. Sec. 47(a). Taylor v. Voss (No. 199) 271 U. S. 176, 46 S. Ct. 461, 70 L. Ed. 889, and cases therein cited; Hinds v. Moore, 134 F. 221, 223, 67 C. C. A. 149; In re Eilers Music House (C. C. A.) 270 F. 915, 925.' "

The court, in the case of *Hirschfeld v. McKinley,* 78 F. (2d) 124 (9th Cir.), after drawing the distinction between "controversy" and "proceedings" in bankruptcy, stated:

> "Applying the definitions contained in the foregoing decisions, we have no difficulty in classifying the instant case as a 'controversy' in bankruptcy, 'arising between the trustee representing the bankrupt and his creditors, on the one side, and adverse claimants on the other, affecting the extent of the estate to be distributed.' Taylor v. Voss, *supra,* 271 U. S. 176, at page 181, 46 S. Ct. 461, 464, 70 L. Ed. 889.
>
> Being a 'controversy' and not a 'proceeding,' the instant case may be appealed without the permission of this court."

11 *U. S. C. A.* section 47(a) invests the Circuit Court of Appeals with appellate jurisdiction from the several courts of bankruptcy in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy to review, affirm, revise or reverse both in matters of law and in matters of fact, provided that when the order involves less than $500.00, an appeal may only be taken upon allowance of the Appellate Court.

Appellants contend that the order of the bankruptcy court was not limited to money only, but on the contrary deprives appellants of their vested property right in the oil to the extent of $4,000.00 for which right in the oil they paid a total of $11,400.00. As heretofore stated, the order of the bankruptcy court was not limited to the mere sum of $846.08; it provided that all proceeds from said 12% be paid to the trustee. The sum of $846.08 represented only that which had accrued to the last day of the month immediately preceding the issuance of the order to show cause.

The Circuit Court of Appeals for the Third Circuit was called upon to interpret the meaning of this limitation of $500.00 on the privilege of appealing as a matter of right in a controversy in bankruptcy in the case of *In re Winton Shirt Corporation,* 104 F. (2d) 777. The appeal was from an order of the district judge directing the referee to furnish a transcript of certain testimony desired by the appellee, who was a creditor of the bankrupt. One of the questions raised was whether the appeal was properly before the court, not having been allowed by it. The court held that many orders, decrees or judgments arising in bankruptcy proceedings directly involved no sum of money whatsoever and cited many examples and in discussing its right to entertain an appeal under 11 U. S. C. A. 47(a), as to the wording "involves less than $500.00," it said:

> "We conclude that when the amended statute makes use of the word 'involves' it does so in the accepted sense in which that word is generally used, viz., to embrace, include or concern directly. It follows therefore that the order appealed from in the case at bar cannot be measured in terms of dollars.

Was it the intention of the framers of the amendment to permit appeals as a matter of right from all orders, decrees or judgments (save only as to interlocutory orders, decrees or judgments in controversies arising out of bankruptcy proceedings as distinguished from proceedings therein) in which no sum of money is involved, as well as from all orders, decrees or judgments involving the sum of $500 or more? It may of course be argued with plausibility that an order which does not involve any sum of money cannot involve $500, and that therefore an order not involving money cannot be appealed to this court except upon allowance of an appeal by this court. Such a ruling, however, would prohibit appeals as a matter of right in those cases which were allowed expressly under Section 25 of the Bankrutpcy Act, 11 U. S. C. A. Sec. 48, as it existed prior to the recent amendment under discussion, including appeals from such judgments granting or denying a discharge to a bankrupt. Moreover, it should be noted that the amendment embraces in its terms the provisions theretofore included in Section 25a of the Bankruptcy Act. While the interpretation of Section 24a here contended for by the appellant would increase greatly the number of appeals, such an interpretation liberalizes the right of appeal in bankruptcy. While we were first inclined to adopt the narrower view contended for by the appellee to the effect that only orders, decrees or judgments involving sums of money and sums of money of $500 or over were appealable as a matter of right, we now conclude that such a view would be erroneous."

In support of their decision the court referred to the case of *Robertson v. Berger,* 102 F. (2d) 530, decided by the Second Circuit, which involved an appeal from an order adjudging the bankrupt in contempt for failing to produce books, and the court quoted from this last mentioned decision as follows:

> " 'We think that it (the amendment) means, not that our jurisdiction is discretionary whenever the order "involves" anything except money of more than $500 in amount, but only when it "involves" money alone, and less than $500. Our reasons are drawn both from the letter and the apparent purpose. Literally, an order like that at bar does not "involve less than $500"; since it involves no money at all, it cannot involve less than any sum, for the comparative necessarily implies the characteristic. So much for the words. As to the purpose, the exception, which seems to have been drawn from Sec. 25(a) (3), 11 U. S. C. A. Sec. 48, was apparently designed to exclude trifling disputes. Unless it be limited to money, this purpose will be defeated, for there are many orders which "involve" other things, but are of much greater importance than claims for $500. Such, for instance, are orders, punishing a witness for contempt, appointing or removing a trustee or a receiver, forbidding the bankrupt to leave the district, allowing examinations under Sec. 21a, 11 U. S. C. A. Sec. 44(a), closing first meetings of creditors. Even stays of suits cannot be said to "involve" the amount claimed against the bankrupt except by a strain, for they merely hold up their prosecution. Cases where the sum in question is less than $500, but the sanction is imprisonment, or where the sanction is a fine of less than $500, we do not decide; for here, although the value of the books as paper

> is indeed less than $500, the trustee does not want the papers, but the records upon them, and those have no money value. Hence neither the stake nor the sanction can be appraised in money.'"

and in conclusion, stated:

> "In our opinion the language just quoted correctly states the law upon this subject. We hold therefore that the appellant was entitled to appeal the order *sub judice* as a matter of right and that no allowance of the appeal was required."

The case of *Scott v. Jones,* 115 Fed. (2d) 133, was an appeal by three creditors who had claims aggregating slightly more than $300.00 from an order of the bankruptcy court directing property of the bankrupt to be sold at public auction. The trustee sought to have the appeal dismissed. The court, in denying the motion to dismiss this appeal, stated:

> "The motion is predicated upon section 24 sub. a of the Bankruptcy Act, as amended by the Act of June 22, 1938, 52 Stat. 840, 854, 11 U. S. C. A. Sec. 47, sub. a, which provides that the Circuit Courts of Appeals are vested with appellate jurisdiction in proceedings in bankruptcy, and in controversies arising in bankruptcy, and that 'when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.' It is contended that since the claims of appellants aggregate less than $500 the amount in controversy is less than such figure and therefore appellants could appeal only by allowance of

> this court. But their claims are not involved. The question whether they have *bona fide* claims, and if so in what aggregate amount, is not present. The question involved is whether the interest of the bankrupt estate in certain property was property sold at private sale or should be sold at public auction. The manner of sale of an interest in property is the question at issue on the appeal, not the claims of appellants. The provision in the statute relating to the manner of perfecting an appeal where less than $500 is involved has no application to this appeal. Compare Robertson v. Berger, 2 Cir., 102 F. (2f) 530; *In re* Winton Shirt Corporation, 3 Cir., 104 F. 2d 777."

Appellants respectfully submit that the reasoning in the above cases is directly applicable to their case as the order of the bankruptcy court, not only deprived them of their interest in the proceeds in the oil then held by the Standard Oil Company, but also deprives appellants of their title and interest in the oil itself until such time as unpaid creditors in the drilling of Well No. 1, to the extent of $4,000.00, have been paid. It is clear, therefore, that the cash amount involved does actually exceed $500.00 as to each appellant. Furthermore, appellants' royalty interest was acquired at a cost of $11,400.00, which establishes that the value of appellants' property interest, which has been subordinated to the rights of general creditors greatly exceeds $500.00.

POINT II.

A Trust Fund Was Established for Appellants and the Aggregate Amount to Which They Are Entitled From This Trust Fund Exceeds $500.00.

Appellants contend that the Circuit Court of Appeals has jurisdiction of this matter for the additional reason that the amount involved on this appeal, held by the Standard Oil Company is a trust fund for appellants' benefit and that the rights and interests of appellants in and to this fund is common and that the amount of their joint claims is the test of jurisdiction. In the brief of appellants on file herein, appellants have cited numerous cases to show that the moneys held by the Standard Oil Company were trust fundes for the benefit of appellants. Consolidated Royalties, Inc., under the division order, was entitled to receive payment and collect the total proceeds derived from this 12% interest. Appellants are claiming under a common source of title and to this extent are in privity in claiming such trust fund, which was established for their benefit. The right of several persons whose individual claims were less than the jurisdictional amount to be heard under such circumstances was upheld in *Rodd v. Heartt,* 17 Wall. U. S. 354, 21 L. Ed. 627, *Putnam v. Timothy Dry Goods, etc.,* 79 Fed. 454, and *Troy Bank v. G. A. Whitehead & Co.,* 222 U. S. 39.

The appeal in this case is from a joint order which affected the common interests of appellants in this trust fund. They were cited in an order to show cause together and, as the court stated in *Investors Syndicate v. Smith,* 105 F. (2d) 611, at page 617:

> "A further ground of appellee's motion is that appellants have joined in a single appeal, instead of

taking three appeals, as appellees contend they should have done. We think appellees' contention is without merit. The appeal is not from three orders, but from one only. Each appellant has, it is true, a separate interest, but all have a common interest in reversing, if they can, the order appealed from. The questions presented are common to them all. It was proper, therefore, for them to join in a single appeal. Crim v. Woodford, 4 Cir., 136 F. 34, 36."

Where a judgment runs against defendants jointly, the value of their aggregate interest determines jurisdiction. *Friend v. Wise,* 111 U. S. 798. Furthermore, rule 74 of the Rules of Civil Procedure for the District Courts of the United States provide that parties interested jointly, severally or otherwise in a judgment may join in an appeal therefrom.

In the case of *Peterson v. Sucro,* 98 Fed. 878, an action was instituted to try title to land. Defendants contended that the jurisdictional amount was not involved because plaintiff's interest was mortgaged and its value was not shown to exceed $3,000.00 above the mortgage. The Circuit Court held, however, that the jurisdiction of the court was not affected by the amount of the outstanding mortgage since it was the value of the land involved in the controversy, rather than merely plaintiff's equity of redemption therein that would determine jurisdictional amount and in the case of *Greenfield v. U. S. Mortgage Co.,* 133 Fed. 784, where the plaintiff sought to remove a cloud on the title to land appearing because of foreclosure of a mortgage, which amounted to less than the jurisdictional amount, the court upheld the jurisdiction stating that the value of the land, not the amount neces-

sary to redeem was the determining factor. Certainly, appellants' interests in the oil is not limited to the sum held by the Standard Oil Company on April 30, 1940. Appellants paid $11,400.00 for their said interest in such oil, and the fact that the bankrupt valued a one percent interest at $1,500.00 establishes that the value of appellants' property so taken for creditors far exceeds $500.00.

Conclusion.

Appellants respectfully submit, therefore, that the Circuit Court of Appeals has jurisdiction, because the order of the bankruptcy court covers in addition to $846.08, proceeds from appellants' oil to the extent of $4,000.00. Furthermore, appellants are entitled to join in this action in establishing their right to the trust fund held by the Standard Oil Company for their common interest and the amount so held is to be taken as the criterion in determining the jurisdictional amount involved. Appellants, therefore, urge that the Circuit Court of Appeals has appellate jurisdiction to hear and determine this matter.

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